No. 85-2163

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD L. JOHNSON, Administrator of the Estate of Ronald M. Johnson, Sr., Deceased,

Petitioner,

v.

MAX E. COLLEY and ALL-AMERICAN, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ROBERT GILBERT JOHNSTON *
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737
Attorney for Petitioner

Of Counsel:

ANDREW J. KLECZEK
1100 Peoria Savings Plaza
Peoria, Illinois 61602
(309) 676-4645

MICHAEL P. SENG
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

*Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

An order of the Supreme Court of Illinois entered on November 15, 1979, states:

> "The rules of this court make no provision for filing a motion for reconsideration of an order of this court denying a petition for leave to appeal or petition for rehearing. The Clerk of the Supreme Court is directed not to accept or file such motions and is further directed to return them to the tendering party or attorney."

The question presented in this litigation is:

Whether the Supreme Court of Illinois which denied a petition for leave to appeal, then, in violation of its own order, accepted a motion to reconsider its order, and, upon reconsideration, allowed the petition for leave to appeal violated Due Process and Equal Protection of Law.

PARTIES AFFECTED

Plaintiff-Appellee, Donald L. Johnson, Administrator of the Estate of Ronald M. Johnson, Sr., Deceased, and Defendants-Appellants Max E. Colley and All-American, Inc., were the only parties to the proceeding in the Supreme Court of Illinois whose judgment is sought to be reviewed. The names of the parties appear in full in the caption.

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v.

MAX E. COLLEY and ALL-AMERICAN, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Your Petitioner, Donald L. Johnson, Administrator of the Estate of Ronald M. Johnson, Sr., Deceased, respectfully asks that a writ of certiorari be issued to review the decision of the Supreme Court of Illinois in the above-captioned case.

OPINION BELOW

The opinion of the Supreme Court of Illinois, that is reported at 111 Ill.2d 468, 490 N.E.2d 685 (1986), is attached as Appendix A. The order denying the petition for rehearing is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on February 6, 1986, a copy of which is attached as Appendix A. An order denying a timely motion for rehearing was entered on April 1, 1986, a copy of which is attached as Appendix B. This Court has jurisdiction under Title 28, Section 1257, United States Code.

CONSTITUTIONAL PROVISION AND ORDER INVOLVED

Fourteenth Amendment, United States Constitution

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Order Of The Supreme Court Of Illinois Entered On November 15, 1979

The rules of this court make no provision for filing a motion for reconsideration of an order of this court denying a petition for leave to appeal or petition for rehearing. The Clerk of the Supreme Court is directed not to accept or file such motions and is further directed to return them to the tendering party or attorney. (cited in *Johnson v. Colley*, 111 Ill.2d 468, 472; 490 N.E.2d 685, 687 (1986), a copy of which is Appendix A.)

STATEMENT OF THE CASE

Ronald M. Johnson was killed in an automobile accident. Petitioner Donald L. Johnson, administrator of the estate of Ronald M. Johnson, filed a wrongful death action against Respondents Max E. Colley and All-American, Inc. At trial, the jury assessed damages in the amount of $1,282,488.96, and found the decedent 60% contributorily negligent. On appeal, the appellate court overturned that jury finding but otherwise found no error. It remanded with directions to enter judgment for the Petitioner in the amount of $1,282,488.96.

The Respondents filed a petition for leave to appeal to the Supreme Court of Illinois. The court denied the petition. The Respondents then filed a motion for reconsideration of the order denying leave to appeal. The court allowed the motion for reconsideration, and, upon reconsideration, granted leave to appeal. At the time the court allowed the motion for reconsideration and granted leave to appeal, there was an order in effect entered by the Supreme Court of Illinois on November 15, 1979, which stated:

> "The rules of this court make no provision for filing a motion for reconsideration of an order of this court denying a petition for leave to appeal or petition for rehearing. The Clerk of the Supreme Court is directed not to accept or file such motions and is further directed to return them to the tendering party or attorney."

Based on this order, Petitioner filed a motion to dismiss the appeal on the grounds that the court was without jurisdiction to accept or allow a motion for reconsideration of its order denying leave to appeal. Petitioner in his motion contended that the court's action denied him

due process of law. The court denied the motion to dismiss the appeal and reversed the appellate court. It reinstated the jury finding that the decedent was 60% contributorily negligent. Petitioner filed a timely motion for rehearing on the grounds that the court's action denied him Due Process and Equal Protection of Law under the Fourteenth Amendment. The motion for rehearing was denied.

Petitioner now asks this Court for a Writ of Certiorari to the Supreme Court of Illinois.

REASONS FOR GRANTING THE WRIT

An order of the Supreme Court of Illinois entered on November 15, 1979, states:

> "The rules of this court make no provision for filing a motion for reconsideration of an order of this court denying a petition for leave to appeal or petition for rehearing. The Clerk of the Supreme Court is directed not to accept or file such motions and is further directed to return them to the tendering party or attorney."

Despite this order, the Supreme Court of Illinois accepted a motion by Respondent for reconsideration of its order denying leave to appeal. Upon reconsideration, it granted leave to appeal. Petitioner filed a motion to dismiss the appeal. He contended that the court was without jurisdiction to reconsider its order denying leave to appeal. He claimed the court's action violated due process. In its opinion, the court denied the motion to dismiss. Appendix A at A-3. It reversed the appellate court and reinstated the jury finding that the decedent was 60% contributorily

negligent. Petitioner then filed a timely motion for rehearing. He claimed the court's action in accepting and allowing the motion for reconsideration of its order denying the petition for leave to appeal violated Due Process and Equal Protection of Law under the Fourteenth Amendment. The court denied the motion for rehearing.

This case involves fundamental rights arising under the federal constitution. The question presented is of "substance"; the question is not merely "episodic" or "academic." See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1985). The legal principles underlying the question presented is whether government, in this instance the Supreme Court of Illinois, should follow its own rules or may arbitrarily create or destroy claims. This Court has addressed those principles in the past and should address those principles in this case. In a somewhat different context, this Court in *United States v. Nixon*, 418 U.S. 683 (1974) ruled that government is "bound to respect and enforce" its own rules. In *Nixon* the President sought to nullify a regulation which allowed the Watergate Special Prosecutor to contest the claim of executive privilege. This Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) ruled that state government may not arbitrarily destroy a state-created claim. In *Logan* the Supreme Court of Illinois had refused to hear a FEPA claim because it was not timely processed by a state agency. In this case the Supreme Court of Illinois refused to follow its own rules and deprived Petitioner of a state-created judgment.

Like other branches of government, courts ought to follow their own rules and orders. Failure of courts to follow their own rules and orders erodes public confidence in the judicial system and encourages sloppy, incompetent practice by lawyers. At a time when the Illinois judiciary

and bar are struggling to maintain public credibility, it is vital that the Illinois courts follow their own rules and orders. The well-publicized, on-going federal Greylord investigation into corruption by members of the Illinois judiciary and bar has tarnished the image of the Illinois judicial system. In order to maintain its credibility the Supreme Court of Illinois in this case and others should follow its own rules and orders. In *United States v. Nixon*, 418 U.S. 683 (1974), this Court was faced with the question of whether the federal executive branch was required to follow its own regulation. In *Nixon* the Attorney General by regulation gave the Watergate Special Prosecutor who was investigating alleged misconduct by White House staff members unique tenure and authority. Among other powers, the Attorney General gave the Special Prosecutor explicit authority to contest claims of executive privilege in seeking relevant information. The Special Prosecutor asked for certain tapes and documents regarding conversations between the President and others. The President claimed executive privilege and challenged the authority of the Special Prosecutor to ask for the tapes and documents. This Court pointed out that the regulation which gave the Special Prosecutor authority to contest claims of executive privilege had the force of law. Further, this Court held that "[a]s long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of three branches of government is bound to respect and to enforce it." *Id.* at 696. By the same token, the Supreme Court of Illinois is bound to respect and to enforce its own rules and orders. In this case it did not respect or enforce its own rules or orders. Its failure to follow its own rules or order interfered with Petitioner's property interest in his money judgment without Due Process or Equal Protection of Law.

Illinois Supreme Court Rule 367 provides for a rehearing of an appeal only after an "opinion" by a reviewing court. Ill. Rev. Stat. ch. 110A, par. 367 (1985). "It does not allow petitions for rehearing to be filed from decisions denying petitions for leave to appeal (see rules 306, 308, and 315)." Smith-Hurd Annotated Statutes, ch. 110A, par. 367, Historical and Practice Notes at 309. Indeed, according to both case law and order of court, the rules of the Illinois Supreme Court make no provision for filing a motion for reconsideration of an order denying a petition for leave to appeal. *Leathe v. Thomas*, 233 Ill. 430 (1908) held that reconsideration should only be allowed in the case of inadvertence in which a judgment other than the one intended was entered. The order of the Illinois Supreme Court entered on November 15, 1979, expressly instructed the clerk of the court not to accept or file motions for reconsideration of an order denying a petition for leave to appeal, but rather to return them to the tendering party or attorney. Until the Supreme Court of Illinois accepted the petition for rehearing in this case, every practitioner in Illinois familiar with the rules and orders of appellate practice in Illinois would have believed that such petitions were not allowed and would be returned to them by the clerk of the court if tendered to the court. However, in its opinion in this case the Supreme Court of Illinois stated that "this court, on several occasions, has allowed a motion filed in accordance with Rule 361 (87 Ill.2d R. 361) for leave to file a motion for reconsideration." *Johnson v. Colley*, 111 Ill.2d 468, 472, 490 N.E.2d 685, 687 (1986). The court does not identify what or when those occasions were. And Rule 361 is a rule that merely describes the form and manner in which motions are presented in the reviewing court. It makes no provision for filing a motion for reconsideration of an order denying leave to appeal. Rule 361 was not intended to allow the

filing of motions not otherwise recognized by law, much less a motion expressly prohibited by case law and an existing order of court. In *People v. Barker*, 59 Ill.2d 201, 205-06, 319 N.E.2d 810, 812 (1974), the Illinois Supreme Court in addressing Rule 361 held:

> "The defendants have sought to have the authority of the appellate court to entertain and grant motions for summary disposition upon Rule 361 of this court. . . . That is the rule which governs ordinary motions filed in both the supreme and appellate courts. It contains no specific authority with respect to the summary disposition of cases without filing of briefs."

By the same token, Rule 361 contains no specific authority for motions for reconsideration of orders denying petitions for leave to appeal, and, any implied authority one may perceive is negated by *Leathe v. Thomas, supra*, and the order of the Illinois Supreme Court entered on November 15, 1979. Therefore, once the petition for leave to appeal was denied, the judgment of the appellate court overturning the jury finding that the decedent was 60% contributorily negligent was final. The Supreme Court of Illinois in *Rubin v. Kohn*, 344 Ill. 166, 172, 176 N.E. 259, 261 (1931) held that the affirmance of a decree in a previous suit by the appellate court and the denial by the supreme court of a writ of certiorari for further review was a final adjudication of the case. The Supreme Court of Illinois in this case, therefore, was without jurisdiction to accept or to allow the motion for reconsideration of the order denying the petition for leave to appeal.

The final judgment of the appellate court constituted property. It was an individual entitlement grounded in state law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). The judgment was at least as substantial a property interest as a FEPA claim, a right to education,

or a horse trainer's license which this Court has held are constitutionally protected. *Id.* at 431. Petitioner could not be deprived of the judgment without due process of law. Regardless of state practices, once a person establishes a property interest that is constitutionally protected, the Fourteenth Amendment defines the minimum procedural requirements which protect that interest. *Id.* at 432. In this case, the Supreme Court of Illinois by its own case law, rules, and order, was without jurisdiction to accept or allow a motion for reconsideration of an order denying a petition for leave to appeal. Nevertheless, it, without explicit procedures which permitted its action and in disregard of procedures that proscribed its action, deprived petitioner of his judgment. That deprivation was without due process of law. Further, the Supreme Court of Illinois by its action creates two classes of lawyers and litigants. The first class consists of lawyers who read, understand, and follow the published opinions, rules, and orders of court and their clients. The second class consists of those lawyers who do not read, understand, or follow the published opinions, rules, and orders of court, or who have access to unpublished practices known only to a few, favored or select members of the bar, and their clients. Such a classification is constitutionally impermissible. It violates equal protection of law.

CONCLUSION

Litigants are entitled to due process and equal protection of the law under the Fourteenth Amendment. In this case the petitioner was deprived of due process and equal protection of the law by the Illinois Supreme Court when

it failed to follow its own published opinions, rules, and order. For those reasons, the petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment and order of the Supreme Court of Illinois.

Respectfully submitted,

ROBERT GILBERT JOHNSTON *
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737
Attorney for Petitioner

Of Counsel:

ANDREW J. KLECZEK
1100 Peoria Savings Plaza
Peoria, Illinois 61602
(309) 676-4645

MICHAEL P. SENG
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

* Counsel of Record

APPENDIX A

Opinion Of The Supreme Court Of Illinois

No. 61321

DONALD L. JOHNSON, Adm'r, Appellee, v.

MAX E. COLLEY *et al.*, Appellants.

Filed February 6, 1986

JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiff, Donald L. Johnson, administrator of the estate of Ronald M. Johnson, Sr., deceased, appealed from the judgment of the circuit court of Cook County entered upon a jury verdict in his favor against defendants, Max E. Colley (hereafter Colley) and All-American, Inc. The appellate court reversed the jury's finding that decedent was 60% contributorily negligent, affirmed the judgment in favor of plaintiff, and remanded with directions to enter judgment on the verdict assessing plaintiff's damages in the amount of $1,282,488.96. (128 Ill. App. 3d 849.) We denied defendants' petition for leave to appeal. Subsequently we allowed defendants' motion for leave to file a motion for reconsideration of the denial of their petition for leave to appeal and, upon reconsideration, allowed the petition (94 Ill. 2d R. 315(a)).

Plaintiff's decedent, Ronald M. Johnson, Sr., died as the result of injuries suffered in a collision which occurred on Interstate 55 south of Joliet at about 5 a.m. on December 30, 1977. The testimony shows that decedent, his wife and four sons were traveling in their automobile to their home in Scottsdale, Arizona. They were driving south on Inter-

state 55 when their automobile struck the side of and passed underneath, a semi-tractor-trailer truck owned by defendant All-American, Inc., and driven by defendant Colley. The truck was stopped so that the trailer completely blocked both southbound lanes of the highway. The top of decedent's automobile was sheared off and decedent suffered fatal head injuries. Colley, the driver of the truck, did not testify, and defendants presented no evidence to show how the truck and trailer came to be in that position, nor was any evidence presented as to what, if anything, Colley did to warn other drivers. It is undisputed that Colley did not place flares near the truck. The record also shows that visibility was severely limited by darkness and the presence of dense fog in the area. Shortly after the occurrence in which decedent was injured an automobile and two semi-tractor-trailer trucks also struck defendants' trailer.

In reversing the finding that plaintiff's decedent was 60% contributorily negligent, the appellate court found that the evidence indicated that prior to the collision decedent was driving slowly, that under *Kyrouac v. Brockman* (1983), 120 Ill. App. 3d 249, defendants had the burden of proof to establish any contributory negligence on the part of plaintiff's decedent and that defendants had not met their burden.

Defendants contend that the appellate court misinterpreted the burden of proof, that the record shows that the jury's finding is not contrary to the manifest weight of the evidence, and that in reversing the verdict the appellate court erred.

Plaintiff contends that the uncontradicted evidence showed that defendants' truck suddenly and without warning appeared in front of the decedent, straddled across the highway, that defendants failed to sustain their burden of proving that plaintiff's decedent was guilty of contribu-

tory negligence, and that the appellate court correctly held that defendants failed to show that the collision resulted from anything other than their own negligence.

Prior to discussing the issues presented in this appeal we consider plaintiff's contention that the appeal should be dismissed. He argues that the denial of the petition for leave to appeal was a final order, there is no provision in the rules for a motion for reconsideration, and our order of November 15, 1979, demonstrates that no such motion may be filed. The order to which plaintiff refers stated:

> "The rules of this court make no provision for filing a motion for reconsideration of an order of this court denying a petition for leave to appeal or petition for rehearing. The Clerk of the Supreme Court is directed not to accept or file such motions and is further directed to return them to the tendering party or attorney."

This court, by reason of the provisions of article VI, sections 16, 6, and 4 of the Constitution of 1970, is vested with rulemaking authority sufficiently comprehensive to regulate all aspects of the appellate process. Recognizing that our authority stems from the Constitution and not from our infallibility, and consistent with precedent (see *Leathe v. Thomas* (1908), 233 Ill. 430), this court, on several occasions, has allowed a motion filed in accordance with Rule 361 (87 Ill. 2d R. 361) for leave to file a motion for reconsideration. That procedure was followed here, and the motion for reconsideration was allowed. Assuming, *arguendo*, that as contended by plaintiff, permitting the filing of a motion for reconsideration is a violation of our order and of due process, the requirements of due process are met in permitting the filing of a motion under Rule 361, and plaintiff's motion to dismiss is denied.

Plaintiff contends that the court's holdings in *Sughero v. Jewel Tea Co.* (1967), 37 Ill. 2d 240, and *Calvetti v.*

Seipp (1967), 37 Ill. 2d 596, require that the judgment of the appellate court be affirmed. In our opinion, however, *Sughero* and *Calvetti* are distinguishable in that here defendants do not contend that the evidence fails to prove that their negligence was a proximate cause of the decedent's death. In *Calvetti* the plaintiff was a passenger in an automobile being driven by her son-in-law, and there was no basis in the record for attributing negligence on his part, if any, to her. To the extent that the plaintiff's contributory negligence was an issue in *Sughero*, the opinion states that the plaintiff testified that he was driving in his proper lane, that he saw the defendant's tractor skid into his lane, and that although he applied his brakes, he could not stop in time to avoid the collision. Unlike *Sughero*, there is here no evidence which indicates how long defendants' tractor-trailer had been blocking the southbound lanes. David Gallery, a plaintiff whose case was consolidated with this case for trial, was driving an automobile which struck defendants' truck shortly after decedent's automobile did so. There is no testimony which indicates how long after decedent's automobile struck the truck the Gallery collision occurred. Gallery testified that there was a great deal of fog, that the pavement was wet and slippery, that the weather was freezing, and that there were ice patches north of the point of the collision. The fog was so thick that drivers were forced to reduce their speed to 10 to 15 miles per hour.

Two other plaintiffs, whose cases were consolidated with these cases, were driving semi-tractors which struck defendants' truck. From the vantage point of the driver's seat of a tractor, these plaintiffs were able to see approximately 55 to 60 feet ahead. A State Trooper who investigated the occurrence stated that visibility was approximately 20 to 25 feet.

Whether the appellate court erred in reversing the finding of the jury and directing the entry of judgment in the full amount of the verdict must be determined by the standards enunciated in *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494. Since *Pedrick*, the rule has been that "verdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." (37 Ill. 2d 494, 510.) In light of the testimony concerning the condition of the road and limited visibility caused by the heavy fog, and the fact that decedent's automobile apparently struck the trailer with sufficient force to cause it to run under the trailer and shear off the top of the automobile, we do not agree with the appellate court that an order which had the effect of the entry of a judgment *n.o.v.* was appropriate.

Plaintiff argues that the verdict of the jury was contrary to the manifest weight of the evidence. Had the appellate court found that the verdict was contrary to the manifest weight of the evidence, the appropriate judgment on reversal would be the granting of a new trial on the issue of damages rather than the remand with directions to enter what was in effect a judgment *n.o.v.* The long-established rule is that a jury finding will not be set aside on the ground that it is contrary to the manifest weight of the evidence unless the opposite result is clearly apparent. From our examination of the record we conclude that the evidence was sufficient to sustain the verdict.

Plaintiff contends that the testimony of the decedent's careful habits proved his freedom from contributory negligence and that defendants failed to produce any evidence to support the verdict. As we noted earlier, there was

no evidence to show how defendants' truck came to be in the position of blocking the highway or what, if anything, Colley did to warn other drivers. The only testimony concerning the decedent's actions is that of his son, who said he was "driving slow" and that immediately prior to the impact he heard his father say, "Oh no." The witness could not state any opinion concerning the condition of visibility at the time or the distance which the automobile traveled after he heard his father's exclamation.

Whether conduct was negligent or contributorily negligent is rarely decided as a matter of law. The determination of what conduct is negligent or contributorily negligent is a composite of the experiences of average people, and is left to the jury for evaluation. We note, parenthetically, that in the trial of these consolidated cases the jury found each driver-plaintiff contributorily negligent and held that plaintiffs who were passengers in the vehicle were not contributorily negligent. Although the verdicts in the other cases do not control the result here, they indicate careful consideration by the jurors of the testimony and the court's instructions. On this record, considering the testimony and the circumstances shown, we cannot say that the jury verdict must be modified either as a matter of law or as being contrary to the manifest weight of the evidence.

For the reasons herein stated, the judgment of the appellate court insofar as it reversed that part of the judgment which reduced plaintiff's damages by reason of contributory negligence is reversed, and otherwise the judgment is affirmed. The judgment of the circuit court is affirmed.

Appellate court affirmed in part and reversed in part; circuit court affirmed.

APPENDIX B

Order Of The Supreme Court Of Illinois Denying The Petition For Rehearing

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

April 1, 1986

Mr. Andrew J. Kleczek
Attorney at Law
1100 Peoria Savings Plaza
Peoria, IL 61602

No. 61321 — Donald L. Johnson, Admr., etc., appellee, v. Max E. Colley, et al., etc., appellants. Appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 11, 1986.